

STATE OF MICHIGAN
COURT OF APPEALS

ATTORNEY GENERAL,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
CONSUMERS ENERGY COMPANY, and
MIDLAND COGENERATION VENTURE
LIMITED PARTNERSHIP,¹

Appellees.

UNPUBLISHED

August 2, 2007

No. 265762

MPSC

LC No. U-014274

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

The Attorney General appeals as of right the June 30, 2005 order of the Michigan Public Service Commission (the Commission). We affirm.

I. Facts and Procedural History

On September 30, 2004, appellee Consumers Energy Company (Consumers) filed an application with the Commission seeking approval of its power supply cost recovery (PSCR) plan and factors for the 12-month period ending December 2005. Consumers proposed a PSCR factor of \$0.00737 per kilowatt-hour (kWh) for each month of the affected year. In its proposal, Consumers concluded that it could not charge its residential customers the full \$0.00737 PSCR factor under the cap established by MCL 460.10d(2). Nevertheless, it proposed that the PSCR factor for residential customers should be increased by an amount equivalent to any decrease in other factors applicable to residential customers, so long as the total rate charged did not exceed the cap imposed by MCL 460.10d(2). Further, in its PSCR plan, consumers proposed to treat its transmission costs as costs that it could recover as a PSCR factor rather than as costs to be recovered under its base rate.

¹ Midland Cogeneration Venture Limited Partnership did not participate in this appeal.

In relevant part, the Attorney General objected to both Consumers' proposal to increase the PSCR factor applicable to residential customers by an amount equal to any other rate reductions and to Consumers' proposed treatment of its transmission costs as costs recoverable under the PSCR clause. Despite the Attorney General's objections, the Commission approved Consumers' PSCR plan and factors in an order entered June 30, 2005. This appeal followed.

II. Standards of Review

The standard of review applicable to orders of the Commission is narrow and well defined. *In re Michigan Cable Telecommunications Ass'n Complaint*, 239 Mich App 686, 689; 609 NW2d 854 (2000). Under MCL 462.25, "[a]ll rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until found otherwise"² Further, the party challenging an order of the Commission bears the burden of showing "by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." MCL 462.26(8).

The Commission is a creation of the Legislature and "possesses only that authority bestowed upon it by statute." *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988). This Court reviews de novo the proper interpretation of statutes such as the public service commission act, MCL 460.1 *et seq.*, see *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 153; 721 NW2d 233 (2006), but will give great weight to any reasonable construction of a regulatory scheme that the Commission is empowered to administer. *Attorney General v Public Service Comm*, 269 Mich App 473, 480; 713 NW2d 290 (2006) (*Attorney General I*). However, this Court will not abandon its responsibility to interpret the applicable statutes and determine legislative intent under the guise of deference to the administrative agency's construction. *Id.* "Moreover, this Court strictly construes the statutes which confer power on the [Commission]." *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155; 596 NW2d 126 (1999). A grant of authority to the Commission must be conferred by clear and unmistakable language. *Id.* at 156.

III. Transmission Costs

The Attorney General first argues that the Commission lacked the statutory authority to authorize Consumers to recover its costs associated with transmitting electricity to its customers as a PSCR factor. We cannot agree. This Court recently held that transmission costs "are properly recoverable in a PSCR clause" under MCL 460.6j(1)(a). *Attorney General v Public Serv Comm*, ___ Mich App ___, slip op. at 9; ___ NW2d ___ (2007) (docket no. 259845, issued July 3, 2007) (*Attorney General II*). Therefore, the Commission did not exceed its authority when it authorized the recovery of transmission costs as a PSCR factor.

² The railroad commission act, MCL 462.2 *et seq.*, is applicable to the Commission under MCL 460.4. See *Consumers Power Co v Public Service Comm*, 460 Mich 148, 156-157 n 6 and 7; 596 NW2d 126 (1999); see also MCL 460.54.

IV. Rate Cap

Under the statutory rate freeze imposed by MCL 460.10d(2), Consumers charged its residential customers a PSCR factor of \$0.00257 per kWh. However, Consumers later obtained an increase in the PSCR factor to \$0.0035 per kWh to reflect the termination of the surcharge associated with the decommissioning of Consumers' Big Rock Point nuclear power plant.³ In the application underlying the present case, Consumers proposed an increase in the PSCR factor to \$0.00737 per kWh. However, because of the rate cap imposed by MCL 460.10d(2), Consumers acknowledged that it could not charge the full \$0.00737 per kWh as a PSCR cost for residential customers. Nevertheless, Consumers contended that it should be allowed to increase the PSCR factor to the extent that the increase is offset by reductions in the base rate applicable to residential customers. Consistent with this interpretation, Consumers proposed a total PSCR factor of \$0.00350 per kWh. The Commission agreed with Consumers and determined that the rate cap provided by MCL 460.10d(2) only applied to the total charge levied and, therefore, concluded that the PSCR factor could be increased as long as the total charge to residential customers did not exceed the cap established by MCL 460.10d(2).

On appeal, the Attorney General argues that the PSCR factor is a rate within the meaning of MCL 460.10d(1) and (2) and, consequently, may not be increased beyond the levels established by MCL 460.10d(1) prior to January 1, 2006.⁴ See MCL 460.10d(2). Therefore, the Attorney General concludes, the Commission was without the authority to authorize Consumers to raise the PSCR factor applicable to residential consumers. We agree with the Commission's determination that the term "rates," as used under MCL 460.10d(1) and (2), properly applies to the total amount charged to individual consumers rather than the component factors.

But for an exception not applicable in the present case, MCL 460.10d(1) provides that,

... the commission shall establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000. Notwithstanding any other provision of law or commission order, rates for each utility with 1,000,000 or more retail customers established under this subsection become effective on June 5, 2000 and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003.

In addition, MCL 460.10d(2) provides that in "no event shall residential rates be increased before January 1, 2006 above the rates established under subsection (1)."

³ See February 28, 2005 order in Case No. U-13917.

⁴ According to the Attorney General, Consumers' PSCR factor for residential customers should be \$0.00257 per kWh until the expiration of the cap.

Throughout the provisions of MCL 460.10d(1) and (2), the Legislature placed limits on the “rates for an electric utility with 1,000,000 or more retail customers.” Giving the term “rates” its plain and ordinary meaning, the term logically refers to the total amount paid by the utility’s customers per kWh and not to the individual components that are totaled to derive the charge. The use of the plural simply recognizes that there are different classes of customers that pay different rates.⁵ Indeed, MCL 460.10d(2) recognizes as much when it states that “[t]here shall be no cost shifting from customers with capped rates to customers without capped rates as a result of this section.” Likewise, the Legislature implicitly recognized the Commissions’ authority to adjust the individual components of the rate charged to residential consumers when it provided that, “until the end of the period described in [MCL 460.10d(2)], the commission shall not authorize any fees or charges that will cause the residential rate reduction required under [MCL 460.10d(1)] to be less than 5%. MCL 460.10d(8). Finally, this understanding of the term “rates” is also consistent with the definition applicable to PSCR factors, which clearly indicates that the factors are a mere component of the overall rate charged. See MCL 460.6j(1)(b) (defining PSCR factor to mean “that *element* of the *rates* to be charged for electric service to reflect power supply costs incurred by an electric utility”) (emphasis added); see also MCL 460.6h(1)(c). Hence, under the plain language of MCL 460.10d(1) and (2), the statutory cap on rates provided by MCL 460.10d(2) does not apply to the individual components that make up the total rate charged to the utility’s customers.⁶ Because the Commission retains the general authority to approve the rates charged by utilities, see MCL 460.552 and MCL 460.557, it was within the authority of the Commission to authorize an increase in the PSCR factor applicable to the rate charged by Consumers so long as the total rate does not exceed the limits imposed by MCL 460.10d(2). See *Attorney General II*, slip op. at 8.

V. Conclusion

The Commission properly authorized the recovery of Consumers’ transmission costs as a PSCR cost and had the power to authorize an increase in the PSCR factor that does not result in a

⁵ MCL 460.10d(2) contemplates three classes of customers: manufacturing and commercial customers with annual peak demands of 15 or more kilowatts, manufacturing and commercial customers with annual peak demands of less than 15 kilowatts, and residential customers.

⁶ Although we conclude that the term “rates,” as used in MCL 460.10d(1) and (2), clearly refers to the total amount per kWh charged by a utility and not the individual components that make up the rate, to the extent that the meaning of the term “rates” can be considered open to interpretation, we conclude that the Commission’s construction of the term is a reasonable interpretation of the regulatory scheme it was empowered to administer and, therefore, is entitled to deference. See *Attorney General I*, *supra* at 480.

total rate in excess of the cap established by MCL 460.10d(2). Therefore, we affirm the Commission's order.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Kurtis T. Wilder